Supreme Court, U. S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1114

PHILIP B. CARY,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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No.

PHILIP B. CARY, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, PHILIP B. CARY, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit entered December 13, 1979.

OPINIONS BELOW

In its discretion the Court of Appeals for the Third Circuit rendered decision without opinion. The Judgment Order is therefore reproduced in the Appendix to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether or not the sentence imposed upon the Petitioner was excessive and thus fundamentally unfair so that the Petitioner was deprived of due process of law according to the Fifth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The Petitioner was indicted by a United States grand jury sitting in Newark, New Jersey, on April 10, 1979. The indictment as drafted contained two (2) counts. The first count charged that Philip B. Cary, while employed as an accountant by the City of Plainfield, attempted to evade the income tax due and owing by him to the United States in violation of Title 26 U.S.C. §7201, by concealing gross income received from the Anti-Recidividism Program of the Second Street Youth Center in his 1972 income tax return. Count Two charged Cary with making statements he knew to be false on his 1972 Federal income tax return in violation of Title 26 U.S.C. §7206 (1).

The trial commenced on June 18, 1979 and continued until June 25, 1979,

when the jury returned a verdict of guilty on both counts. On July 30, 1979, the Petitioner was sentenced to a custodial term of three (3) years on each count with the said sentence to run concurrently.

At sentencing the Court noted that "he had received a lot of letters and had spoken to people who have come in and seen me about the case," regrettably, the trial court failed to spell out the details of the numerous letters as to the character of the Petitioner submitted on the Petitioner's behalf, and failed to state whether he was relying on these letters or disregarding them.

A great deal of mitigating factors should have been considered which the District Court, in failing to render a fair and individualized sentence,

did not consider. These factors are set forth in the following excerpt of the sentencing transcript where counsel for the Petitioner vigorously argued:

> "As the Court well knows Mr. Cary stands before this Court on July of 1979 for events involving conduct in 1972, seven years ago. He was convicted on two (2) counts: one, wilfully failing to pay a large part of his income in 1972 and, two, in connection with a tax violation, making a material misrepresentation on his income tax return for 1972, which he filed.
>
> "Your Honor, there is no question it's a serious offense and there is no question certainly it's a matter which the Government has an interest in regulating. But I submit that the seriousness of this offense must be weighed as part of the totality of the circumstances as to what a just punishment should be, especially since the offense occurred seven years ago. I think, your Honor, what we must do when we decide what a just punishment is in 1979 is view what Mr. Cary was before the time of the offense and since

> the time of the offense to decide in the long run what will be in the best interest of the community.
>
> "First of all, your Honor, I think a critical fact is that Mr. Cary stands before this Court as a first offender. He has never been convicted of any crime and the Court, which has been through far more sentencings than I can even imagine, I suspect would concur if anybody deserves a break or if anybody deserves some kind of consideration it is a first offender. It's somebody who stands before the Court on the first time around.
>
> "Secondly, your Honor, I think we should look at Mr. Cary's employment history, because we have had a man who from the time he left high school has always been gainfully employed, has always attempted to maintain proper employment, to make his just contribution to society and to support his daughter of his prior marriage. And I think when we view the character of the man and whether or not this is an isolated mishap or something which is part of a way of life with the man, we should look at not only his lack of prior record but his employment history which up until his termination by the City of Plainfield, involving this matter and this matter

alone, has always been an exemplary employment history.

"I think another factor we should consider, your Honor, is the service record of this man. During the middle of his schooling in the early fifties, during the Korean War, this man was drafted, served honorably his country for two years, achieved the rank of corporal in the United States Army Infantry and he was given an honorable discharge.

"So we look at a lack of any prior convictions, a good employment record, the fact that he had a good service record and I think that must all count for something.

"Your Honor, I also think one of the things we should consider when the Court decides whether or not a custodial sentence is appropriate is the type of good works this man has performed in the community, the type of services this man has performed in the community. We need only to look at the fact he has worked and donated a great deal of his time to the Mt. Sinai Church in Brooklyn, to St. John's Church in Scotch Plains and to the Mt. Sion (sic) Church in Plainfield, to appreciate as a choir master, as an organist. Your Honor, this is not only matters which he is paid a small stipend or some kind

of donation. We heard th pastor of the church of Scotch Plains who talked about Mr. Cary's work gratis for them, and attempted to help them pick out an organ, how in effect, he said, 'We would trust Mr. Cary with the keys to our church.'

"To a certain extent--although I will not go through all of the letters which I know the Court has read and the Court has reviewed --they are tributes to what people feel both prior to the time of the offense and subsequent to the time of the offense is the character of Mr. Cary. All of the people in the choir, teachers, senior citizens groups, even an Internal Revenue Service agent himself has written letters as to the character of Mr. Cary. And I submit, your Honor, these letters are written not because people wanted to do a favor for a friend but because the way Mr. Cary has conducted his life absent this one transaction has been exemplary because the way he has donated his time and his services and I suspect his enthusiasm to the churches, to the young people, to a certain extent by music himself as we heard testimony, to a certain extent doing what he can to maintain church services of a high degree. It's things like that which has sparked the

type of enthusiasm which I submit, your Honor, in my brief career as a lawyer, I have never seen for any other defendant, whether it be a public official or somebody with long years in the community. I have never seen like the enthusiasm which the different church groups have **for this man** prior to his conviction. If, to a certain extent, you can tell the character of a man by the company he keeps, if you can tell the character of a man by the number of people who are willing to stand--come forward and make a recommendation when the man is in trouble, then a lot can be said for Phil Cary. And, your Honor, he must have been doing a lot right and he must have been doing a lot of good prior to this one transaction or this one year for the income tax charges and subsequent thereto.

"I can only remember Reverend Lowe who, during the course of the trial, who was our first character witness and who the Court properly stated, had to only answer certain questions and give only certain information in terms of under our law is proper and appropriate character testimony, but everybody can remember his enthusiasm. He said, "I want to tell you about the character of this man and the credit he's been to the choir and how hard he works and I want to tell you as to the good he did.'

And, your Honor, may not have been appropriate before the jury, it sure is appropriate here, especially when we're talking about a charge in 1972 (sic 1979) arising out of transactions in 1972.

"Has the man been in any trouble since '72? The answer is no. Has the man committed an offense prior to '72? The answer is no. Your Honor, therefore, standing before you is a first offender. Does the man need rehabilitation? The answer is no. Will the man do it again? The answer is in the terms of this offense, he's been held up to such disgrace, he's been fired from his job, there is really no serious chance he'll do it again.

"So in the ultimate what the Court is faced with is a decision, what really is to the best interest of a society in '79 arising out of an offense in '72. I submit in view of his work with the churches, in view of his work with the church groups, in view of the fact all of these churches and pastors want Mr. Cary back, want Mr. Cary to work with the church groups, want Mr. Cary's talent, that in the best interest to all concerned and fairness to Mr. Cary, sentence will be appropriate. And I say to the Court with all of the vigor in my command, with all of the sincerity I can muster

> in terms of my dealings with him, the hours of work we have put in together, that this is a fine man. It would be in the best interest of society to impose a non-custodial sentence and since he's a first offender this is exactly the time of the Court where the Court--to use the vernacular--should give the man a break, especially since it was seven years ago and that's what I ask your Honor, a non-custodial sentence."

The Petitioner filed a timely notice of appeal on August 6, 1978, and the Honorable James A. Coolahan ordered that bail be continued pending a determination on appeal of this matter.

On December 13, 1979 the United States Court of Appeals for the Third Circuit affirmed the conviction (1-a), without opinion.

REASONS FOR GRANTING THE WRIT

The sentence imposed upon the Petitioner was excessive thus violating his right to due process of law.

Since Williams v. New York, 337 U.S. 241, 69 S. Ct. 1078, 92 L. Ed. 1337 (1949), it is axiomatic to a rational scheme of sentencing law that there must be a discernable relationship between the facts of each case and the sentence imposed. The goals and purposes of punishment by a rational and fair criminal justice system must be affirmed in the judgment rendered and sentence imposed. These goals are not represented in the three (3) year custodial sentence imposed upon the Petitioner, Philip B. Cary, who is a first offender.

This sentence is a product of a

fixed and mechanical approach that is fundamentally unfair to the Petitioner and is manifestly excessive in light of the totality of circumstances surrounding the case -- especially in view of the fact that the indictment alleges an income tax violation in only one (1) year.

While it is undeniable that the Government must have its law vindicated, it is the basic policy consideration for implementing punishment that must be considered in evaluating the severity of sentence imposed upon the Petitioner. In Williams the Court cited with approval those basic policy considerations to be used in determining an appropriate sentence (337 U.S., at 248), as: (a) rehabilitation of the offender; (b) the protection of society; (c) the disciplining of the wrongdoer,

and (d) deterrence of others from committing like offenses.

The court in United States v. Daniels, 446 F. 2d 967 (6th Cir. 1971), primarily focused on these considerations in remanding for reconsideration of sentence a five (5) year custodial term imposed upon a defendant for failure to comply with an order of his local Selective SErvice Board to report in violation of 18 U.S.C. §462. There, the court reasoned suggesting appropriate sentencing considerations (446 F. 2d at 972):

> "The imprisonment of Appellant can hardly be deemed helpful in reforming a young man of concedely 'good character' and 'model behavior'. Imprisonment cannot serve as protection for society because the immediate release of appellant poses no risk to society's safety. Moreover disciplining or punishing the Appellant by imprisonment would seem to be an inappropriate rationale for sentencing where, as here, a young man has devoutly adhered to his

> religious beliefs without impeding the rights of others. Finally, under the limited factual circumstances of this case, the issuance of an order probating the Appellate subject to his performance of the identical work demanded of him by the Selective Service is not the kind of sentencing which would induce widespread disobedience of the orders of local Selective Service boards."

A fixed and mechanical approach to sentencing is repugnant to the standards of fair and responsible justice systems. Dorszynski v. United States, 418 U.S. 424 (1973); United States v. Baker, 487 F. 2d 360 (3d. Cir. 1973). In United States v. Schwarz, 500 F.2d 1935 (2d Cir. 1973), the finding that the court employed a fixed and mechanical approach in imposing sentence was made even where the record indicated that the District Court noted it "read the pre-sentence report at least five times and read every letter that was

sent to me by a number of people."

Similar to the sentences imposed in Daniels and Schwarz, there is no evidence on the record "that the district court evaluated the information on the record in light of the basic factors relevant to the sentencing of a criminal offender", the Court in the case at bar acknowledged that letters were received about the case but neither offered any justification for the imposition of such a severe judgment nor articulated the role the letters played in rendering the judgment.

Although the custodial sentence imposed upon the Petitioner is within the statutory limits of 26 U.S.C. §7201 and 26 U.S.C. §7206(1), the sentence rendered is inconsistent with the developing standards of an enlightened society. The case of Philip

B. Cary is indeed one in which a custodial sentence is not required. Certainly the imposition of a three (3) year custodial sentence upon a first offender for income tax violations involving a filing in a single year will only serve to undercut the goals of an enlightened society.

While the Third Circuit did find that the sentence imposed did not amount to a violation of fundamental concepts of justice, with respect to sentencing, espoused in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1078, 93 L.Ed. 1337 (1949) and its progeny.

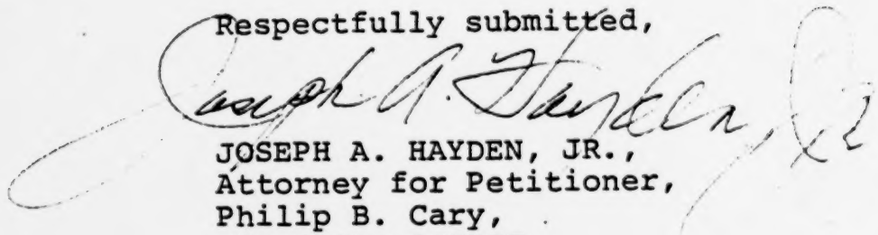
Therefore, the Petitioner seeks review by this Court to determine whether fundamental concepts of justice were violated by the Third Circuit's affirmance of the excessive and fundamentally unfair sentence imposed by the United

District Court.

CONCLUSION

Wherefore, the Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2071

UNITED STATES OF AMERICA

vs.

CARY, PHILIP B.,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 79-00141)

Submitted Under Third Circuit Rule 12(6)
December 13, 1979
Before: ALDISERT, VAN DUSEN and
HUNTER, Circuit Judges

JUDGMENT ORDER

After considering the contention raised by appellant, to-wit that the sentence imposed upon the appellant by the district court is fundamentally

unfair and excessive; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: DEC 13 1979

October Term, 1979

No.

PHILIP B. CARY, Petitioner

v.

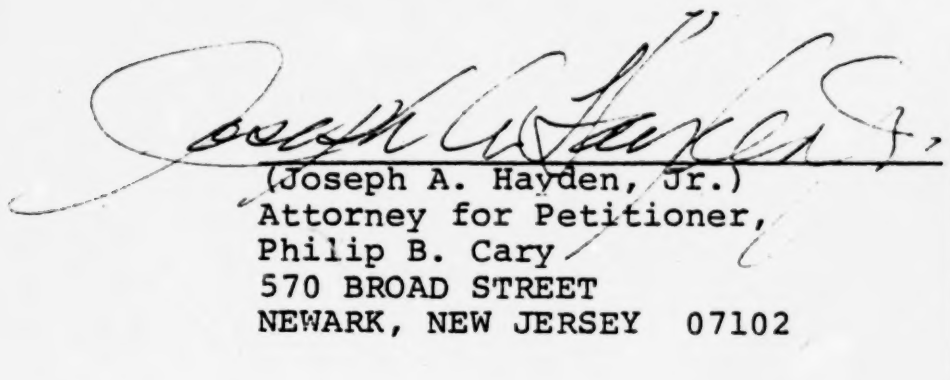
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE - Service by Mail (S. Ct. Rule 33(3) (b)).

STATE OF NEW JERSEY)
) SS.:
COUNTY OF ESSEX)

I, JOSEPH A. HAYDEN, JR., depose and say that I am the attorney for record for PHILIP B. CARY, the Petitioner herein, and that on January 14, 1980 pursuant to Rule 33, Rules of the Supreme Court, I caused to be served two (2) copies of the foregoing Writ of Certiorari as follows:

On the Solicitor General, by mailing the copies in a duly addressed envelope with first class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.



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